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No. 09-151

In The
Supreme Court of the United States

WILLIE PHILLIPS, MARY PHILLIPS,
LISA PRATER, CARLISA MILES,
YULANDER EDWARDS, AND LERDON WOODFOLK,
Petitioners,

v.

ROBERT GATES, SECRETARY
OF THE DEPARTMENT OF DEFENSE,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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August 3, 2009

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QUESTIONS PRESENTED

1. Whether the Court of Appeals must follow the precedent set by this Honorable Court regarding the burden of proof required for a disparate impact claim.

2. Whether the Court of Appeals' decision allowing a disparate treatment analysis to counter a disparate impact analysis negates the mandate of Congress in enacting 42 U.S.C. § 2000e-2(k) and creates further confusion as to the proper disparate impact standard.

3. Whether the Court of Appeals in disregarding 29 C.F.R. § 1607.4(D) has created an impossible burden for the disparate impact plaintiff when it was determined that the employer failed to maintain applicant flow data.

PARTIES TO PROCEEDING

Petitioners are Willie Phillips, Mary Phillips, Lisa Prater, Carlisa Miles, Yulander Edwards and Lerdon Woodfolk.

Respondent is Robert Gates, Secretary of the Department of Defense, who has oversight of the United States Defense Finance Accounting Office, an agency within the United States Department of Defense.

In addition to these parties, the following individuals were parties to the proceedings below: Todd Brooks, Emma Fields, Kevin Gray, Jackie McGrady, Susan McNeal, Marcia Spence, Jean Washington, and Denise Goudy.

RULE 29.6 STATEMENT

Each of the Petitioners is an individual and not a corporation or a subsidiary or affiliate of a corporation.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, Willie Phillips, Mary Phillips, Lisa Prater, Carlisa Miles, Yulander Edwards and Lerdon Woodfolk, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit decided and filed on May 5, 2009, in Case No. 07-3515, and reported as Phillips, et al., v. Gates, No. 07-3515 (6th Cir. May 5, 2009), and is reproduced at 1a.

This matter has made two prior appearances before the United States Court of Appeals for the Sixth Circuit, both reversing summary judgment, once on a limitations issue, and once on the merits. Those decisions are reported as Phillips v. Cohen, 3 F. App'x 212 (6th Cir. 2001); and Phillips v. Cohen, 400 F.3d 388 (6th Cir. 2005). This matter was tried to the district court which entered judgment for the defendant. The district court's decision is reported as Phillips, et al., v. Gates, No. 2:98-cv-799 (U.S. Dist. Ct. SE Div. Jan. 5, 2007), which is reproduced at 15a.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was entered May 5, 2009 (1a). This petition is timely filed. Sup. Ct. R. 13. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Uniform Guidelines On Employee Selection Procedures (1978) 29 C.F.R. § 1607.4(D)

D. Adverse impact and the "four-fifths rule." A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may

be considered in determining adverse impact. Where the user has not maintained data on adverse impact as required by the documentation section of applicable guidelines, the Federal enforcement agencies may draw an inference of adverse impact of the selection process from the failure of the user to maintain such data, if the user has an underutilization of a group in the job category, as compared to the group's representation in the relevant labor market or, in the case of jobs filled from within, the applicable work force.

Unlawful employment practices
42 U.S.C. § 2000e-2(k)

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if -

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the

> Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C. 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

The United States Defense Finance Accounting Office ("DFAS") was created in 1991 as an independent agency within the United States Department of Defense. The purpose of DFAS was to provide four services:

1. To pay contractors of the Department of Defense;

2. To pay vendors of the Department of Defense;

3. To pay accounting services for the smaller Department of Defense agencies; and

4. To disperse money for the smaller Department of Defense agencies.

Prior to DFAS' creation, 25,000 employees were working at field sites, which had their own systems, computer software and record keeping methods. In the beginning of 1990, DFAS decided to consolidate these field sites into one large agency to reduce costs and to

create efficiency and consistency of operation. When DFAS was created in 1991, the agency was unique from the other centers in that it did not have a workforce already established and ready to perform the consolidated activities that were going to be brought to Columbus, Ohio. Instead, DFAS-CO had a field office, called the Defense Contract Supply Center ("DCSC"), with a core group of 200 employees who were doing some of the consolidated work. These core groups were responsible for implementing the consolidation and staffing of the DFAS-CO workforce from 400-500 employees in 1991 to 3,500 employees in 1995. The consolidation process took 3-4 years and the initial effort was to bring not just the positions to Columbus, but the employees who held those positions at the time to utilize their skills. Despite this effort, less than 10% of the employees came with their positions in 1991. Those employees who transferred with their positions came from Atlanta, Boston, Albuquerque, New York, Los Angeles and elsewhere. Those employees who did arrive in Columbus with their positions were racially diverse. A large segment of the 10% of employees who re-located to Columbus were African-Americans.

During the rapid hiring period between 1991 and 1995, DFAS Columbus hired approximately 3,000 new employees and offered many promotional opportunities. Between 1991 and 1995, DFAS Columbus hired an average of 70 employees per month. Almost immediately after the rapid hiring period, a downsizing period occurred, caused by streamlining and operating efficiency.

During the 1991 to 1995 hiring period, DFAS was "very aggressively recruiting" for the new and empty

positions by filling them with non-federal employees "off the streets" of Columbus. During that period, the Petitioners began to notice that many of the other employees hired "off the streets" were Caucasian and had no prior government experience, yet were being rapidly and progressively promoted at a faster rate than themselves. Indeed, many of the Appellants found that, over time, their new white co-workers trained by them became their supervisors.

At the same time, the Petitioners witnessed what they believed to be favoritism and nepotism in the hiring and promotion process. For example, many of the Petitioners observed abuses in the detail process. Detailing is a policy where a manager directly fills a position with the desired employee instead of posting an open and vacant position for competitive bidding. This type of promotional procedure did not require that DFAS follow normal promotion procedures, thus, an employee could be promoted without competing with other applicants.

The Petitioners also noticed other practices that affected their promotional opportunities. These observations and resulting concerns created an open morale problem for DFAS management in 1995.

The Petitioners' primary concern was that a number of employment practices existed at DFAS which impacted them negatively, including detailing, general favoritism, nepotism, pre-selection, favoritism in issuing performance ratings and performance awards, and harsher treatment of African-American employees through discipline.

Further, the competitive promotion process at DFAS-CO was complex, and consisted of over eighteen separate steps which provided the selecting official a large amount of discretion when promoting employees. This promotional process permitted the supervisor to determine such steps as (1) the timing of an opening, how the position was filled, (2) who could apply for the position based on the area of consideration, (3) the criteria for the selection, (4) who was on the promotion certificate with the discretion to request more names on the certificate, and (5) the ultimate decision to select the desired candidate from the certificate. By design, this process gave the supervisor unbridled discretion and input into the promotion process. As a result, the promotion process became highly vulnerable to favoritism and pre-selection among selecting managers to favor a particular candidate.

In 1996, several DFAS newspaper articles were written by, and to, DFAS-CO employees which discussed why few African-American employees were being promoted to higher GS levels. As a result, the Director of DFAS-CO, Charles Coffee, and his Principal Deputy Director, Ida Faye Groves, directed a team of DFAS employees and two outside consultants to investigate allegations of favoritism, racism and pre-selection.

On December 6, 1996, Director Coffee, issued a Memorandum stating that as a result of "numerous concerns from our employees regarding Merit Promotion and Equal Employment Opportunity issues," he was establishing a Process Action Team (PAT) to review and evaluate the Appellee's "Merit Promotion policy and procedures" and to examine the following issues:

1. **Are only non-minorities advancing to GS-11 level and above?**
2. **Is there pre-selection of jobs?**
3. **Are management selection patterns discriminatory? and**
4. **Are personal relationships impacting selection and promotions?**

The PAT team consisted of DFAS-CO employees and two outside consultants named Thomas Gary and Roland McDonald from Togar & Associates. The PAT team took a two-pronged approach which included interviewing 25% of the DFAS-CO workforce to obtain current perceptions, and then analyzing the actual merit promotion and EEO statistical data for the years 1995 and 1996.

After several months of investigation and study, the PAT team released its report on March 3, 1997, (dated January 24, 1997), with the title "Employee Survey and Assessment of Defense Finance & Accounting Service Columbus Center". The PAT Report was 122 pages in length and analyzed twelve issues:

1. Limited upward mobility opportunities for employees.
2. Limited internal mobility.
3. Consistency in rating, ranking and referral of applicants.
4. Are only non-minorities advancing to the GS-11 level and above?
5. Is there disparity in assessing candidates' qualifications?
6. Is there pre-selection for jobs?

7. Are personal relationships impacting selections and promotions?
8. Does nepotism exist – family members (spouses/children) in the same organizations or in supervisory chains?
9. Are management selection patterns discriminatory?
10. In the distribution of awards, performance appraisals, and disciplinary actions equitable?
11. Do employees fear reprisal from DFAS-CO and Columbus Center EEO personnel?
12. Does the EEO staff only comply with management's decisions?

After the release of the PAT Report, the Petitioners became aware for the first time of the statistical barriers in merit promotional opportunities for African-American employees at DFAS-CO as indicated by the following conclusions of the PAT team:

1. Minorities continue to be promoted at lower rates than non-minority employees especially at the higher levels;

2. Several groups, especially Black males, continue to be underrepresented at the higher grade levels at the Columbus Center;

3. Evaluation of application content was subjective;

4. There is a strong perception that discrimination, whether race based or not, exists at the Columbus Center. In the case of

employee X [Chris Carter], management may have committed a prohibited personnel practice;

5. White females received 72 percent of the exceptional rating in 1995. This may have impacted their selection during the Merit Promotion process... [T]his research has shown that supervisors rate employees from their own RNO [Race National Origin] group higher than they rate employees from other groups; and

6. The data shows that White male ... selecting officials show strong ethnic preferences in awarding promotions.

Further, the PAT Team concluded in the Togar section of the PAT Report that:

1. The allegation of [favoritism and preselection] appears to have validity in the case of employee X;

2. Regarding Nepotism at DFAS-CO, the team stated "With the exception of the two individuals, all name provided met the definition of a relative as defined in 5 CFR 310";

3. Regarding perceived favoritism, the Team concluded: "The core of individuals perceived to be benefactors of favoritism have all been promoted at least once within the last five years. Three of those individuals have been promoted twice, 2 to the GS-14 level and 1 to the GS-15 level. Some employees have held

> assignments and participated in various special projects."

Id.

After the PAT Report was provided to Director Coffee and Deputy Director Groves, Principal Deputy Director Groves made a power point presentation of its results to DFAS Headquarters in Arlington, Virginia on February 24, 1997. In her presentation, she discussed the background of the PAT Report and the concerns of the employees. She told senior level officials that according to the PAT report: "Minorities continue[d] to be promoted at lower rates than non-minorities especially at the higher grade levels." Ms. Groves further admitted that White males selected African-American employees only 10.49% of the time when they made up 21% of the DFAS population.

Following Ms. Groves' presentation at DFAS Headquarters, the PAT Report was released to DFAS employees. On July 30, 1997, Petitioner, Willie Phillips, on behalf of a group of DFAS-CO African-American employees, filed a discrimination complaint with the agency's equal employment opportunity office. The complaint alleged that the following practices had caused a disproportional low number of African-American employees to receive promotions:

1. the temporary assignment ("detailing") of White employees into higher-grade positions, which placed them at an advantage in consideration for permanent positions;

2. ethnic preferences for White candidates, among White officials making promotion selections;

3. discretion vested in selecting officials to consider "specialized experience" in promotion decisions;

4. manipulation of performance reviews, employee awards, and the timing of job announcements to give preference to White candidates in the promotion process; and

5. granting promotions to White employees who did not meet the time and grade requirements for the position.

Following its own investigation, the EEO office issued its report July 24, 1997. The EEO Officer made the following findings noted in the Sixth Circuit decision:

1. African-American employees received about 22% of the competitive and non-competitive promotions agency-wide in 1995-96 which comprised approximately the same percentage of the DFAS-CO workforce at that time;

2. For the fiscal year 1995, African-Americans, totaling 670 at DFAS-CO, received a total of 159 awards which comprised of 24% of African-Americans receiving awards;

3. White employees numbering 2,253, received 787 awards, which was 34.9% of Whites receiving awards;

4. African-American employees received 31 disciplines in 1996, or 48.9% of the total disciplinary actions;

5. White employees received 30 disciplinary actions, or 46.87%;

6. The number of African-American employee disciplinary violations comprised 4.5% of the African-American workforce at DFAS-CO;

7. The number of White employee violations comprised 1.33% of the White workforce at DFAS-CO; and

8. African-American employees received 15.75% of the exceptional performance ratings in 1996 while comprising almost 22% of employees. There was no comparative data for White employees.

At trial, Petitioners presented the testimony of Dr. Ramona L. Paetzold, Ph.D., who is an expert in employment discrimination statistics. Dr. Paetzold reviewed data from 1992 to 1996 describing the promotional practices at DFAS-CO for African-American employees compared to the promotion rates for White employees to determine whether the promotion rate for African-American employees was significantly smaller. Her analysis consisted of (1) looking at the aggregate of promotion rates, (2) reviewing the number of promotions for African-American employees as a percentage to get their promotion rate, (3) considering the number of promotions for White employees using their percentage of who got promoted, and (4) comparing both promotion rates by using a binomial test for African-Americans and White employees for the period of 1992 to 1996.

Dr. Paetzold's testimony offered the supported conclusion that African-American employees were promoted at a statistically significant lower rate compared to Whites within a reasonable degree of scientific certainty. She based her conclusions on her findings that the difference in the two promotional rates for African-Americans and Whites were greater than two standard deviations, so that the amount of spread between the two rates was quite large. Since the promotion spread for each group was more than two standard deviations, Dr. Paetzold found that the statistical evidence suggested discrimination. Admittedly Dr. Paetzold encountered a difficulty in her statistical analyzes due to the fact that DFAS-CO's failed to maintain all the applicant flow data. The data of who applied for the available positions and were not promoted. However, Dr. Paetzold was able to compensate for the lost data through her methodology. Dr. Paetzold used a single pool approach by aggregating all the data and conducting 'one large analysis' of racial discrepancies in promotions at DFAS-CO The approach exaggerated the number of applicants for any promotion available but did so equally for both African-Americans and Caucasians.

DFAS's expert, Dr. John G. Claudy, took a different approach. In order to compensate for the lost applicant-flow data of employees who applied for promotions, Dr. Claudy created "constructed pools of applicants," and analyzed promotions in pairs of years, based on assumptions of who would be eligible in the work force. In addition to Dr. Claudy's approach having been criticized by the Sixth Circuit in a previous review of this case, Dr. Claudy's approach was essentially a disparate treatment review of whether there was statistical evidence that the

decision maker for each constructed pool was making intentionally discriminatory hiring decisions. This approach was flawed and should not have been compared to Dr. Paetzold's anaylsis.

In sum, the trial court was presented with sufficient evidence to meet the Petitioner' burden under the theory that Petitioner's promotional practices have had a disparate impact on their opportunities to seek promotions and advance their careers because of their race.

Upon review, the Court of Appeals held that the district court did not err in finding that the expert evidence was in equipoise and that the plaintiffs failed in their burden to establish a prima facie case of disparate impact:

> Although Appellants argue that '[t]he trial court erred in finding Dr. Claudy's expert opinion as credible and trustworthy as Dr. Paetzold's,' it might be better said that the magistrate judge found both expert opinions equally problematic. He therefore accepted neither expert's analysis, and concluded that Appellants had not carried their burden. Although the PAT report, the EEO report, and Appellants' testimony provided some evidence of a perceived race-based disparity at DFAS-CO, the evidence was not sufficient to require a finding that Appellants had demonstrated the type of statistical disparity necessary to establish a Title VII prima face case.

The Court of Appeals also held that the court below did not abuse its discretion in imposing only monetary

sanctions for the destruction of data; as Petitioners had sought an adverse inference. The Sixth Circuit held that such sanctions were not required pursuant to 29 C.F.R. § 1607.4(D), and that "both statistical experts at trial testified that the data from the PAT investigation would not have substantially altered their analyses because it would only have included a sample of information from a two-year period and would not have helped to establish promotion rates for the total period in question."

REASONS WHY THE WRIT SHOULD BE GRANTED

This petition for a writ of certiorari should be granted for two principal reasons. First, the decision of the Sixth Circuit Court of Appeals conflicts with controlling Supreme Court precedent regarding the burden of proof required for a disparate impact claim creating further confusion among the Circuits. Second, the Court of Appeals' decision allowing a disparate treatment analysis to counter a disparate impact analysis, as well as not following 29 C.F.R. § 1607.4(D) when it was determined that the employer failed to maintain applicant flow data, has created an impossible burden for the disparate impact plaintiff and negates the mandate of Congress in enacting 42 U.S.C. § 2000e-2(k).

I. Allowing The Employer To Counter Statistical Evidence Of Disparate Impact By Submitting An Expert Report On Lack Of Statistical Evidence Of Disparate Treatment Conflicts With The Court's Controlling Precedent And Creates Confusion Among The Circuits

Regarding The Burden Of Proof Required For A Disparate Impact Claim.

The Court of Appeals erred as a matter of law in finding that the employer's expert's opinion and the Petitioners' expert's opinion stood in equipoise and therefore the Petitioner failed to show a disparate impact by a preponderance of the evidence. This was in error as the Petitioners' expert used a correct single pool disparate impact analysis, where the employer's expert used a "constructive pool" approach that statistically tested for whether there existed disparate treatment by selecting officials in hiring within pools of applicants. This created a classic apples to oranges comparison error and will create confusion among the Circuits if not corrected.

The Petitioners' expert, Dr. Ramona Paetzold, a nationally known author in employment discrimination statistics, addressed whether African-American employees at DFAS-CO were promoted at a lower rate compared to white employees. Admittedly, Dr. Paetzold and the employer's expert, Dr. John G. Claudy, encountered a problem in their statistical analyses due to the employer's failure to retain the applicant flow data regarding those employees who had applied for promotions. Petitioners' expert, Dr. Paetzold, was able to compensate for the lost data through her methodology. Petitioners' expert used a single pool approach by aggregating all the data and conducting 'one large analysis' of racial discrepancies in promotions at DFAS during the relevant time frame. A standard disparate impact approach. Using this approach, Dr. Paetzold found that the difference in promotion rates between African-Americans and

White employees exceeded two standard deviations, beyond what would be expected in the absence of discrimination.

Unlike Dr. Paetzold, the employer's expert, Dr. Claudy, instead used an approach that is used to find statistical evidence for disparate treatment. In order to compensate for the lost data regarding which employees applied for promotions, Dr. Claudy created "constructed pools of applicants," based on his assumptions of likely applicants. Dr. Claudy based his statistical report using these "constructed pools" which were manufactured to compensate for the missing data. Dr. Claudy then analyzed the races of those promoted from each pool to determine if there existed statistical evidence that the hiring official engaged in discriminatory selection based on race. The data was then compiled in the aggregate. This was a statistical review of whether there existed intentional discriminatory hiring, not a disparate impact analysis. As this Court held, a disparate impact case under Title VII may be established upon demonstration that a particular employment practice causes a significant adverse effect on a protected group. Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989). Likewise, this Court directed that under a disparate impact claim, an employer is prohibited from relying on a neutral employment practice which is nondiscriminatory on its face, but results in a disproportionate impact on a protected class without regard to intent. Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 986-87 (1988). Further, this Court established that disparate impact theory of proof applies to claims of discrimination based on an employer's subjective and discretionary decision-making regarding promotions, even though the use of

subjective criteria in decision-making is not discriminatory *per se*. Watson, 487 U.S. at 989.

Also established by this Court in Watson, in a disparate impact case the complaining party must first identify the specific employment practice that is allegedly responsible for any observed statistical disparity. Id. at 994. "'Once the employment practice at issue has been identified, causation must be proved; that is, the [plaintiff] must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused' the alleged discrimination." Wards Cove, 490 U.S. at 656, *quoting*, Watson, at 994.

Congress also mandated the requirement that a plaintiff must demonstrate that each particular challenged employment practice causes a disparate impact, "except that [if] the complaining party can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation for analysis, the decision making process may be analyzed as one employment practice." 42 U.S.C. § 2000e-2(k)(1)(B)(i). In this case, the promotional process was previously held as incapable of separation. Phillips v. Cohen, 400 F.3d 388, 398-99 (6th Cir. 2005). Although a disparate impact case generally requires proof of "identification, impact and causation," the Sixth Circuit, in a previous review of this case, departed from this requirement. Phillips v. Cohen, 400 F.3d at 398, n. 8,

According to the prior holding, "[i]f the employee challenges the employer's promotion process as a whole, * * *- as in the case here - then the disparate impact and causation elements merge." Id. Thus, the Sixth Circuit held in this matter that the issue that

must be addressed is ,"* * * whether the evidence in the record support[s] a finding that African-American employees [are] promoted at a lower rate than white employees." Id.

Again, the error is the Sixth Circuit's allowance of the employer's disparate treatment analysis to be used to offset the Petitioners' expert's disparate impact analysis. This petition for a writ of certiorari should be granted because the allowance of this error will further confuse the burden of proof for disparate impact claims in the Sixth Circuit and elsewhere. As noted by the Concurrence in Graoch Assoc. #33 v. Louisville/Jefferson County, 508 F.3d 366, 386 (6th Cir. 2007), the Sixth Circuit's cases on disparate-impact claims under Title VII currently conflict. In Graoch, the Concurrence noted that:

> The Sixth Circuit's cases on disparate-impact claims under Title VII, however, conflict. Kovacevich [v. Kent State Univ., 224 F.3d 806 (6th Cir.2000)], holds that once a plaintiff has shown an adverse effect, the burden shifts to the defendants to "articulate a legitimate business reason" for the challenged practice. 224 F.3d at 830. Once the defendant has proffered such a reason, under Kovacevich "the burden shifts back to the plaintiff to show either that the [defendant's] reason is a pretext for discrimination, or that there exists an alternative . . . practice that would achieve the same business ends with a less discriminatory impact." *Id.* In contrast, *Alexander [v. Local 496, Laborers' International Union of North America,* 177 F.3d 394 (6th Cir. 1999), *cert. denied,* 528 U.S. 1154, 120 S.Ct. 1158, 145

> L.Ed.2d 1070 (2000)] holds that once a plaintiff has established a prima facie case by showing adverse effect, "the burden shifts to the [defendant] to produce evidence that the challenged practice is a business necessity." 177 F.3d at 405-06. The difference between the two opinions lies in the fact that by requiring the plaintiff to prove pretext, Kovacevich both imports an intent-oriented principle from the disparate-treatment test into the disparate-impact analysis and places the ultimate burden of persuasion on the plaintiff rather than on the defendant.

This conflict within the Sixth Circuit over the burden required to prove a disparate impact claim is caused by the inappropriate inclusion of "intent-oriented" principles from disparate treatment tests. This conflict has yet to be resolved. The Court of Appeals further erred in this matter by allowing compelling statistical evidence of disparate impact to be refuted by an expert's report that discussed a lack of statistical evidence of disparate treatment. This error exacerbated this present conflict and moves the Circuit further outside the controlling Supreme Court's precedent.

II. The Failure To Apply 29 C.F.R. § 1607.4(D) When It Was Determined That The Employer Failed To Maintain Promotion Data, Destroys The Balance Mandated By The Supreme Court In Wards Cove Between The Plaintiff's Burden In A Disparate Impact Claim And The

Employer's Obligation To Maintain Applicant Flow Data.

The Supreme Court's seminal disparate impact case, Griggs v. Duke Power Co., explained that Congress' objective in enacting Title VII was to "achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." 401 U.S. 424, 429-30 (1971). Congress has allowed for the identification of these barriers to hiring and promotion by an analysis of the statistical evidence of the selection process. 42 U.S.C. § 2000e-2(k). The Supreme Court has guided this analysis by holding that "statistics based on an applicant pool containing individuals lacking minimal qualifications for the job would be of little probative value." Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988), 487 U.S. at 977, 108 S.Ct. 2777. Further, a statistical analysis cannot establish a plaintiff's prima facie case unless it is based on promotion data restricted to qualified employees, or (1) reliable data with respect to that group are unavailable and (2) the plaintiff establishes that the statistical analysis uses a reliable proxy for qualification. This approach holds plaintiffs to their statutory burden to "demonstrate that an employer uses a particular employment practice that causes a disparate impact on the basis of . . . race," 42 U.S.C. § 2000e-2(k)(1)(A)(i), without imposing an insurmountable burden when reliable data on a qualification are not available.

In this matter, the Court of Appeals erred in disregarding the most troubling aspect of the employer's conduct in this case; the failure to preserve the application flow data for those employees who

applied for promotion but were not selected. The employer was obligated to preserve this evidence from three sources in the law:

1) The well-established obligation to preserve evidence relevant to future litigation;
2) 29 C.F.R. §§ 1607.1 & 1607.14; and
3) The district court's preservation order.

The Federal Court's have maintained a long-standing principle of law that a party is obligated to preserve evidence that is relevant to litigation. See Kronisch v. United States, 150 F.3d 112, 126 (2d Cir. 1998); Turner v. Hudson Transit Lines, Inc. 142 F.R.D. 68, 72-73 (S.D.N.Y. 1991); Welsh v. United States, 884 F.2d 1239, 1246 (6th Cir. 1998). This obligation has been held to arise when a party has notice that the evidence is relevant to litigation, but also when a party should have known that the evidence may be relevant to future litigation. Kronisch, 150 F.3d at 126. Further, employers are under the specific obligations imposed by 29 C.F.R. §§ 1607.1 & 1607.14 to preserve these promotional records. In Wards Cove, the Supreme Court noted how the plaintiff's burden in a disparate impact claim is by necessity tied to the employers obligation to maintain such application flow data:

> Some will complain that this specific causation requirement is unduly burdensome on Title VII plaintiffs. But liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims. Also, employers falling within the scope of the Uniform Guidelines on Employee Selection Procedures, 29 CFR § 1607.1 *et seq.* (1988), are

> required to "maintain . . . records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group[s]." See § 1607.4(A). This includes records concerning "the individual components of the selection process" where there is a significant disparity in the selection rates of whites and nonwhites. See § 1607.4(C). Plaintiffs as a general matter will have the benefit of these tools to meet their burden of showing a causal link between challenged employment practices and racial imbalances in the work force; respondents presumably took full advantage of these opportunities to build their case before the trial in the District Court was held.

Wards Cove Packing Co., Inc., et al. v. Atonio et al. 490 U.S. 642, 657-58 (1989).

This petition for a writ of certiorari should be granted to clarify the proper disparate impact burden where records have not been retained as required. By failing to correctly set that standard as the law contemplates, the Court of Appeals made it all but impossible for any plaintiff to meet its burden in any disparate impact case where an employer fails in its obligation to maintain records, rendering the cause of action a legally futile effort.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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